

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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HUMBERTO AMEZCUA, *et al.*,

Plaintiffs,

v.

JORDAN TRANSPORT, INC., *et al.*,

Defendants.

Case No. 2:13-cv-01608-APG-CWH

**ORDER OVERRULING PLAINTIFFS'
OBJECTIONS**

(ECF No. #97)

On June 16, 2016, Magistrate Judge Hoffman struck Drs. Rosler, Ferdowsian, Mortillaro and La Tourette as the plaintiffs' non-retained treating physicians and struck Rosler, Ferdowsian, and Valencia as the plaintiffs' rebuttal experts. ECF No. 84. In striking Drs. Rosler, Ferdowsian, Mortillaro and La Tourette as treating physicians, Magistrate Judge Hoffman held that the doctors may not offer expert opinion testimony but may testify as percipient witnesses. *Id.* The plaintiffs object to Magistrate Judge Hoffman's order and, in the alternative, ask me to clarify the boundaries regarding what Drs. Rosler, Ferdowsian, Mortillaro and La Tourette may testify to as percipient witnesses. ECF No. 97 at 7.

I. LEGAL STANDARD

"A district judge may reconsider any pretrial matter referred to a magistrate judge . . . when it has been shown the magistrate judge's order is clearly erroneous or contrary to law." LR IB 3-1(a). "A finding is clearly erroneous when although there is evidence to support it, the reviewing body on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. Ressim*, 593 F.3d 1095, 1118 (9th Cir. 2010).

1 **II. DISCUSSION**

2 Magistrate Judge Hoffman did not err in striking Drs. Rosler, Ferdowsian, Mortillaro and
3 La Tourette as treating physicians because plaintiff's counsel did not provide a summary of facts
4 and opinions that the doctors would testify to. *See* Fed. R. Civ. P. 26(a)(2)(C). Nor did
5 Magistrate Judge Hoffman erroneously strike Drs. Rosler, Ferdowsian, and Valencia as rebuttal
6 experts. The doctors' reports do not rebut the opinions provided by the defendant's experts.
7 They merely state that the defendant's reports are unpersuasive; that is not rebuttal testimony. *See*
8 *Downs v. River City Grp., LLC*, No. 3:11-cv-885-LRH, 2014 WL 814303, at *2 (D. Nev. Feb. 28,
9 2014) (citing *Cates v. Sears, Roebuck & Co.*, 928 F.2d 679, 685 (5th Cir. 1991)).

10 Therefore, Drs. Rosler, Ferdowsian, Mortillaro and La Tourette may testify only as
11 percipient witnesses. This means, as Magistrate Judge Hoffman stated, that they may testify
12 "about what they saw and did in treating Plaintiffs." ECF No. 84. The scope of their testimony
13 may include the course of treatment that each doctor directly administered to the plaintiffs and
14 what each doctor directly observed while the plaintiffs were under the doctors' care. *See*
15 *McFerrin v. Allstate Prop. & Cas. Co.*, 29 F. Supp. 3d 924, 934 (E.D. Ky. 2014). But the doctors
16 may not testify about causation or their diagnoses because both are expert opinion testimony. *See*
17 *id.*; *Goodman v. Staples The Office Superstore, LLC*, 644 F.3d 817, 826 (9th Cir. 2011).

18 The plaintiffs cite *Carrillo v. B & J Andrews Enterprises, LLC* for the proposition that
19 these doctors should be permitted to offer opinion testimony. *See* ECF No. 97 at 8 (citing No.
20 2:11-CV-01450-RCJ, 2013 WL 394207, at *8 (D. Nev. Jan. 29, 2013)). But *Carrillo* dealt with a
21 different disclosure problem. There, the plaintiff failed to disclose a treating physician's expert
22 report and Magistrate Judge Hoffman limited the physician's testimony to opinions formed
23 during the course of treatment. *Id.* The plaintiffs also argue that the doctors should be permitted
24 to testify using their medical chart. At this time, I see no reason to preclude the doctors from
25 using their medical chart to refresh their recollection so long as the chart is not used to introduce
26 opinion or expert testimony.

1 **III. CONCLUSION**

2 IT IS THEREFORE ORDERED that the plaintiffs' **objections (ECF No. 97) are**
3 **OVERRULED.**

4 DATED this ^{18th} day of July, 2016.



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7 ANDREW P. GORDON
8 UNITED STATES DISTRICT JUDGE